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No.
(Ct. App. No. 59034-1-I)

WASHINGTON SUPREME COURT

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In re the Detention of

CURTIS POUNCY

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COURT OF APPEALS
STATE OF WASHINGTON
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STATE'S PETITION FOR REVIEW

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ORIGINAL

TABLE OF CONTENTS

I.	IDENTITY OF PETITIONER AND DECISION BELOW	1
II.	ISSUES PRESENTED FOR REVIEW	1
III.	FACTS	2
IV.	REVIEW IS APPROPRIATE	8
	A. The Ability of a Party to Challenge the Continued Use By a Professional Expert Witness of Judicially Disapproved Theories Is a Matter of Substantial Public Interest	9
	B. Washington Precedent Does Not Allow a Party to Preserve Error Through a Vague "Foundation" Objection.....	15
	C. The Court of Appeals Acted Contrary to Washington Precedent When It Failed to Conduct a Harmless Error Analysis.....	18
V.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Agranoff v. Morton</i> , 54 Wash.2d 341, 346-47, 340 P.2d 811 (1959).....	17
<i>Blue Cross and Blue Shield of N.J. v. Phillip Morris</i> , 141 F.Supp.2d 320, 323 (E.D.N.Y. 2001)	13
<i>Cerjance v. Kehres</i> , 26 Wash.App. 436, 441, 613 P.2d 192 (1980).....	17
<i>Estate of Ryder v. Kelly-Springfield Tire, Co.</i> , 91 Wash.2d 111, 114, 587 P.2d 160 (1978).	15
<i>Greycas v. Proud</i> , 826 F.2d 1560 (1987).....	14
<i>Newton v. State</i> , 147 Md. 71, 127 A. 123, 131 (1924)	14
<i>Niper v. Snipes</i> , 7 F.3d 415 (4 th Cir. 1993).....	14
<i>Smith v. Shannon</i> , 100 Wash.2d 26, 37, 666 P.2d 351 (1983),.....	15
<i>Spratt v. Davidson</i> , 1 Wash.App. 523, 526, 463 P.2d 179 (1969)	17
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 p.2d 775 (1971)...	10
<i>State v. Castellanos</i> , 132 Wn.2d 94, 97 935 p.2d 1353 (1997).....	10
<i>State v. Cunningham</i> , 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).....	18
<i>State v. Davis</i> , 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000).....	15
<i>State v. Gentry</i> , 125 Wn.2d 570, 639, 888 P.2d 1105 (1995).....	12, 14
<i>State v. Lopez</i> , 95 Wash.App. 842, 856, 980 P.2d 224 (1999).	18
<i>State v. Pastrana</i> , 94 Wash.App. 463, 479, 972 P.2d 557 (1999) ...	18, 20
<i>State v. Powell</i> , 126 Wn.2d 244, 258, 893 P.2d 615 (1995).....	10
<i>State v. Rohrich</i> , 149 Wash.2d 647, 654, 71 P.3d 638 (2003)	10
<i>State v. Silvers</i> , 70 Wn.2d 430, 432, 423 P.2d 539 (1967).....	15
<i>State v. Thomas</i> , 150 Wash.2d 821, 856, 83 P.3d 970 (2004).....	10
<i>U.S. v. Logan</i> , 998 F.2d 1025, 1032, 302 U.S.App.D.C. 390 (C.A.D.C.,1993)	19
<i>United States v. Huddleston</i> , 811 F.2d 974, 978 (6th Cir.1987).....	19

I. IDENTITY OF PETITIONER AND DECISION BELOW

On May 19, 2008, the Court of Appeals, Division I, issued a published decision reversing a six-week sexually violent predator civil commitment trial based solely upon the erroneous admission of impeachment evidence.¹ The impeachment evidence consisted of a few cross-examination questions referencing Findings of Fact from the Yakima Superior Court, which determined that the defense expert's theories were not "generally accepted" in the scientific community. The Court of Appeals reversed the jury's civil commitment determination despite respondent Pouncy's failure to properly preserve the objection and without conducting a mandatory harmless error analysis. Because the Court of Appeals decision presents an issue of first impression that is of substantial public interests and conflicts with prior Washington case law, this court should grant the State's petition for review under RAP 13.4(b), and reverse the decision of the Court of Appeals.

II. ISSUES PRESENTED FOR REVIEW

A. As an issue of first impression, when accessing the weight and credibility of a defense expert witness, did the trial court abuse its discretion by allowing the jury to consider a prior judicial *Frye* determination rejecting some of the expert's theories, especially when the

expert persists in advocating for those same theories despite the prior judicial determination?

B. Does a party properly preserve a claim of error regarding impeachment evidence through a vague and nonspecific objection to "foundation," particularly when the party does not accept the trial court's subsequent offer to strike the testimony with a curative instruction?

C. Is it harmless error to erroneously admit impeachment evidence when the State's case is overwhelming and the impeachment evidence is cumulative?

III. FACTS

Curtis Pouncy is a serial rapist who targets vulnerable women, including women who are young, mentally ill, emotionally distraught, and asleep in their beds. He has also sexually assaulted children. Although not considered by the Court of Appeals in a harmless error analysis, the evidence supporting Pouncy's civil commitment was overwhelming.

Curtis Pouncy began raping and sexually assaulting women at an early age. From ages nine to thirteen, Pouncy fondled several females, including a nine-year-old neighbor girl and his brother's sleeping girlfriend. 8RP 76-77, 5RP 54. At age 13, Pouncy had sexual contact with

¹ A copy of this decision is attached as Appendix A.

his eight or nine-year-old niece. 8RP 72 At age 15, Pouncy was involved in a gang rape of an 18-year-old. 8RP 75.

In his teenage years and into early adulthood, Pouncy was living on the streets, committing daily burglaries and dealing drugs. 5RP 59-60. Some of these burglaries would lead to rapes. If Pouncy found a woman home during a burglary, he would "take advantage of the opportunity" by committing rape. 8RP 79-80.

Pouncy admits that he associated with "pushers and pimps" and forced women to engage in sex acts against their will. 5RP 62. This included pointing loaded pistols at women's heads and threatening them unless they complied with his sexual demands. 5RP 62. Pouncy admitted that he was "intensely aroused" by sexual violence. 6RP 61.

In 1980, Pouncy moved to Hawaii after marrying and joining the military. While living in Hawaii, Pouncy attempted to rape a woman outside of a bar, but no charges were ever filed.. 8RP 80-81, 8RP 173. Pouncy also repeatedly raped his wife during the short time that they were married. 8RP 174. When asked about this by an evaluator, Pouncy said "it was the best, better than any sex we had before." 8RP 78.

Pouncy was not caught for any of his sexual assaults until late 1982 when he was apprehended for raping a thirteen-year-old girl named E.S.

After manipulating her into accepting a ride in his car, Pouncy slammed the car door on her head, threatened to kill her, and put his hands around her neck to choke her. 8RP 50. He raped her vaginally and anally, before the police were able to apprehend him. 8RP 51.

Pouncy was released pending charges. On February 17, 1983, two students at Ridgecrest Elementary School in Seattle were walking to school when Pouncy pulled up alongside the car. Pouncy attempted to get the girls into the car with him, but they both ran away and told the school principal what happened. 8RP 70.

Four days after being released from custody, Pouncy committed another rape. On February 26, 1983, Pouncy manipulated 19-year-old D.A. into going on a date with him. When D.A. was in his apartment, Pouncy came up behind her, put a knife to her throat and threatened to kill her. 8RP 56. He forced her to perform oral sex on him, and after she vomited, he raped her vaginally at knifepoint. 8RP 56. In a later interview, Pouncy admitted that during the attack, he had considered taking D.A. out into the woods and killing her. 8RP 61.

Despite the seriousness of these three offenses, Pouncy was again released from jail pending sentencing in the rapes. On April 4, 1983, K.B. was asleep in her bedroom when she awoke to find Pouncy on top of her,

grabbing her around the neck. 8RP 82. Pouncy said that he was going to rape her and take the money from the house. 8RP 83. K.B. successfully fought Pouncy off and he fled the scene.

Pouncy pled guilty to the D.A. and E.S. He avoided prison by going to the Western State Hospital (WSH) Sexual Psychopathy Program. Pouncy appeared to do well in treatment and was granted work release in May 1988. 7 RP 154-55. It soon became apparent that Pouncy was not willing to follow the conditions of his release. In June of 1988, the WSH program staff learned that Pouncy had picked up a hitchhiker, a serious violation of his conditions of release. 7RP 155-57. Pouncy was terminated from WSH and was sent to the Department of Corrections (DOC). 8RP 96.

In the early 1990s, Pouncy was given another chance at treatment and completed the Sex Offender Treatment Program (SOTP) at the Twin Rivers Correctional Center in Monroe. He again appeared successful and was given glowing reviews. 8RP 101-03. As a result, in May of 1996, Pouncy was granted parole and was released to live with his new wife on Vashon Island. 8RP 103.

When Pouncy was released, he had many positive sources of support in his life. Pouncy had a home, a wife, and a job. 8RP 140-41.

Pouncy had financial resources, he was allowed to travel, and he had friends. 8RP 108-09. He was engaged in sex offender treatment and was communicating regularly with his CCO. He was yet again perceived as successful in his sex offender treatment. 8RP 118-19

Despite this support and without the knowledge of his treatment providers, Pouncy quickly began to engage in risky behaviors, including having multiple affairs with drug-addicted women, picking up a hitchhiker, violating curfew, and being terminated from a job for lying on the application. 8RP 113-14, 8RP 139, 8RP 144. Pouncy was also stopped by the police after he was seen prowling in the backyard of two homes. 8RP 116.

Pouncy committed two sex offenses while free in the community during this period. During his release, Pouncy raped M.F., a friend of his wife. M.F. did not report this crime until the civil commitment trial. 6RP 130-39.

His second sexual assault occurred on July 28, 1996. After attending sex offender treatment group, Pouncy began cruising. He soon saw A.H. walking along the street drinking chocolate milk. 8RP 119. Pouncy pulled up alongside her and he talked her into taking him to her nearby apartment. 8RP 120. Once inside the apartment, Pouncy forced

himself on Harper, grabbed her throat, and threatened to kill her. 8RP 121. Pouncy repeatedly tried to force Harper to have sexual intercourse with him. 8RP 121. Harper got away by jumping out a third-story window and running to the manager's office for help. 8RP 121. Pouncy was arrested a short distance away hiding in some brambles.

Pouncy was convicted on two felonies and a misdemeanor offense. 8RP 136. His parole was revoked and he was sent back to prison where he again enrolled in sex offender treatment.

The State initiated sex predator proceedings under RCW 71.09 upon Pouncy's release from prison. At trial, the State presented the testimony of Dr. Richard Packard, a well-known psychologist who diagnoses and evaluates sex offenders. Dr. Packard testified that Pouncy suffers from paraphelia NOS nonconsent, a mental disorder which fit the definition of "mental abnormality" under RCW 71.09. 8RP 164. Dr. Packard also diagnosed Pouncy with antisocial personality disorder and noted the presence of psychopathy. Dr. Packard concluded that Pouncy was a high-risk sex offender who was likely to engage in predatory acts of sexual violence if not confined to a secure facility. After a six week trial, the jury returned a verdict determining that Pouncy was a sexually violent predator.

The Court of Appeals rejected a number of challenges to the commitment trial, but decided to reverse the Order of Commitment based on improper impeachment of the defense expert, Dr. Richard Wollert. Dr. Wollert is alone in the community of experts by offering testimony that the "Null Hypothesis" and the "Bayes Theorem" somehow prevents the civil commitment of sexually violent predators. The prosecutor first impeached Dr. Wollert through evidence that the leading experts in his field had rejected both theories. VRP 10/10/2006 at 157-159; 162. She next referenced Findings of Fact from a Yakima SVP case where it was determined that Dr. Wollert's Null Hypothesis and Bayes Theorem approaches "are not generally accepted in the scientific community." *Id.* at 161. In the course of this impeachment, Dr. Wollert admitted that he knew of no other expert who uses the Null Hypothesis and the Bayes Theorem "in the way that I do, right." *Id.* at 162-163. Although the State argued harmless error in its appeals brief, Brief of Resp. State at 18-19, the Court of Appeals failed to consider the case under the harmless error doctrine.

IV. REVIEW IS APPROPRIATE

Review of the May 19, 2008 decision of the Court of Appeals is appropriate under RAP 13.4(b). This case presents the court with an opportunity to address an issue of substantial public interest and first

impression nationally regarding the use of a prior *Frye* determination to impeach an expert witness who persists in using disfavored theories. *See* RAP 13.4(b)(4)(allowing a petition for review where there is an issue of substantial public interest that should be determined by the Supreme Court). Even if this testimony was erroneously admitted, the case provides the further opportunity to clarify the more mundane, but critical, doctrines surrounding preservation of error and harmless error. In reversing a six week trial, the Court of Appeals went to extreme efforts to find a preserved error on this record, and then issued its decision without any harmless error analysis. Further review of these portions of the Court of Appeals decisions are appropriate under RAP 13.4(b)(1) & (2) because the lower court's approach conflicts with well-established precedent from this court and the Court of Appeals.

A. **The Ability of a Party to Challenge the Continued Use By a Professional Expert Witness of Judicially Disapproved Theories Is a Matter of Substantial Public Interest**

On a daily basis, trial judges throughout our state make thousands of discretionary decisions regarding the scope of cross-examination and the admissibility of impeachment evidence. If trial courts are to function effectively, it is important that our judges enjoy substantial latitude to make routine and timely, good-faith evidentiary decisions without unnecessary

fear of reversal by appellate courts. Recognizing this important reality, this court has repeatedly emphasized that "[d]eterminations regarding the scope of cross-examination are within the trial court's discretion and will not be overturned on appeal absent an abuse of discretion." *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (citations omitted). The Court of Appeals fails to note or apply this standard in reversing Judge Halpert's ruling.

A trial court abuses only its discretion when its decision is based on untenable grounds or is manifestly unreasonable. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 p.2d 775 (1971). Importantly, abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *State v. Castellanos*, 132 Wn.2d 94, 97 935 p.2d 1353 (1997). To state it more positively, a trial judge does not abuse his or her discretion when the decision falls within the broad range of decisions that any reasonable trial judge might adopt. "[T]he trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did." *State v. Thomas*, 150 Wash.2d 821, 856, 83 P.3d 970 (2004).

Here, Judge Halpert was tasked to quickly decide the admissibility

of the Yakima Findings of Fact for impeachment purposes based on a vague "foundation" objection in the middle of a lengthy cross examination.

Although the Yakima Findings of Fact had been raised during Dr.

Wollert's previous deposition, the defense did not present Judge Halpert with a pre-trial motion in limine. The "objection" failed to elucidate an argument or cite any authority. To make the situation even more difficult, the admissibility of a *Frye* ruling to impeach an expert witness is a question of first impression both in Washington and nationally. These circumstances call for a particularly strong application of the abuse of discretion standard.

The Court of Appeals erred in determining that the trial court abused its discretion by allowing the State to impeach the expert with a prior *Frye* determination rejecting his theories. The impeachment evidence went to the expert's lack of care in persisting to advance theories that were judicially determined to lack general acceptance in the relevant scientific community. As he admitted in testimony, Dr. Wollert continued to advance his theories on the "Null Hypothesis" and the "Bayes Theorem" even though he was the only expert in his field to hold these opinions. VRP 10/10/2006 at 162-63. His operation as a chorus of one is certainly relevant for the jury to consider. The fact that Dr. Wollert then continued

to testify to these same theories after the Yakima court determined that they lacked general acceptance spoke to the extremely cavalier nature of Dr. Wollert's approach to expert testimony. In essence, Dr. Wollert continued to sing his song even in the face of professional and judicial rejection.

Contrary to the Court of Appeals opinion, the Yakima trial court's decision was not properly construed as the "expert opinion" of the Yakima judge on Dr. Wollert's credibility, but instead constituted a *judicial determination* under the *Frye* standard that Dr. Wollert lacked general acceptance.² Rather than a personal comment by the Yakima judge on Dr. Wollert's credibility, the prior court determination "*was the evidence.*"³ *State v. Gentry*, 125 Wn.2d 570, 639, 888 P.2d 1105 (1995). The Yakima findings reached the conclusion that Dr. Wollert lacked

² The Court of Appeals opinion strays on this point. The Yakima findings were not addressing whether Dr. Wollert "had acted consistent with the standard of his profession in interviewing and evaluating Pouncy." Slip op. at 10. Rather, the court was engaging in the judicial inquiry allowed by *Frye* on whether Dr. Wollert's theories were generally accepted. There is no requirement to somehow "qualify a trial court under ER 702 before it makes a "general acceptance" determination.

³ Under *Gentry*, the Court of Appeals claim that judicial findings of fact constitute "hearsay" is plainly incorrect. Although the defense made no hearsay objection, the findings used by the State were a self-authenticating certified public record exempt from hearsay considerations. Moreover, because the findings themselves "are the evidence" under *Gentry*, the hearsay doctrine does not apply.

acceptance in his field after considering Dr. Wollert's testimony and other testimony addressing his methods. Dr. Wollert was involved in those proceedings and it should not be necessary to re-litigate the Yakima findings when Pouncy makes no objection challenging the procedures surrounding those findings.

Because this case involved the unique situation of impeaching an expert who persists in using disfavored theories with the *Frye* determination of another court, the various lower federal cases cited by the Court of Appeals have little application. This is a matter of first impression that calls for a definitive answer.

The primary case relied upon by the Court of Appeals -- *Blue Cross and Blue Shield of N.J. v. Phillip Morris*, 141 F.Supp.2d 320, 323 (E.D.N.Y. 2001) -- had nothing to do with impeachment of an expert through use of a prior *Frye* determination. In the *Blue Cross* case, the federal district court granted a motion in limine preventing the use of comments by a Canadian judge to impeach an expert witness. Rather than a judicial determination under *Frye*, the comments at issue in *Blue Cross* case were those of a Canadian judge addressing the expert's credibility using strong and personal language.

The secondary cases cited by the appellate court are even more

remote. The decision in *Niper v. Snipes*, 7 F.3d 415 (4th Cir. 1993) involved a judicial comment on the credibility of a party in a case, not a prior *Frye* determination by an expert. Similarly, the 1924 Maryland decision in *Newton v. State*, 147 Md. 71, 127 A. 123, 131 (1924), had nothing to do with impeachment of an expert witness through use of a prior *Frye* determination.

The Court of Appeals citation to *Greycas v. Proud*, 826 F.2d 1560 (1987), which involved the use of judicial findings to establish a property right, favors the State's position. Similar to this court's decision in *Gentry*, the federal circuit court draws the distinction between the use of prior judicial decisions "as evidence of facts underlying the judgment" versus the use of prior judicial decisions with independent judicial operation. In the *Greycas* matter, the judicial decision established a property right and itself constituted evidence of title. *Id.* Judge Posner, in allowing use of the state court judgment, points out that "it is a little hard to understand why [the state court judgment] should not be allowed to have merely evidentiary effect if for some reason not all the requirement of res judicata or collateral estoppel are not met." 826 F.2d at 1567.

It is a matter of substantial public interest to determine when a judicial *Frye* determination may or may not be used to impeach the

approach of a professional expert. There is no case law on this question. This court should grant review and examine the question of whether this type of evidence is admissible for the limited purpose of challenging an expert who persists in advocating for theories that lack general acceptance.

B. Washington Precedent Does Not Allow a Party to Preserve Error Through a Vague "Foundation" Objection

The Court of Appeals went to great lengths to explain how Pouncy's vague foundation object preserved the error he now claims on appeal. The appellate court effectively took the bare thread of an objection and wove it into an elaborate tapestry. Because Washington case law requires more to preserve error, this court should grant review.

It is well-established that a party must timely object to the introduction of evidence in order to preserve the alleged evidentiary error for appeal. *State v. Davis*, 141 Wn.2d 798, 849-50, 10 P.3d 977 (2000); *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). One reason that parties are required to lodge objections at appropriate times below is so that parties and trial courts can operate to protect the record and correct any error. *Smith v. Shannon*, 100 Wash.2d 26, 37, 666 P.2d 351 (1983), citing *Estate of Ryder v. Kelly-Springfield Tire, Co.*, 91 Wash.2d 111, 114, 587 P.2d 160 (1978).

Pouncy's objection to "foundation" did not perform this function. When the objection was made, the prosecutor was introducing the impeachment evidence through use of a certified copy of the Yakima findings. In this context, a trial judge would always deny a "foundation" objection because the document is self-authenticating.

The Court of Appeals more elaborate explanation that Pouncy was correctly objecting, based on foundation, to the expert qualifications of the Yakima judge simultaneously tries too hard and not hard enough. If Pouncy was indeed concerned with the expert qualifications of the Yakima judge, the correct objection was not "foundation," but "ER 702." An ER 702 objection would have given the judge at least some notice that Pouncy was challenging the expert admissibility of the findings. Other possible objections were to hearsay, relevance, or prejudice, but none of these were made. It is contrary to this court's precedent to allow a six week trial to be reversed based on a vague and improper objection to "foundation."

An independent reason for finding that Pouncy failed to preserve his claim of error comes in Pouncy's determination not to request a curative instruction after it was offered by the trial court. The day after Dr. Wollert's testimony, Judge Halpert determined that she would instruct the jury to disregard the Yakima impeachment evidence and strike it from the

record. VRP 10/12/2006 at 4-5. The court then gave the parties an opportunity to consider the court's curative instruction and intent to strike the testimony. *Id.* at 37. At a side bar, the court asked counsel for Pouncy "if she was, in fact, affirmatively requesting that [the court] give such an instruction." *Id.* Counsel for Pouncy "said no, that she didn't object, but she wasn't affirmatively requesting it." *Id.* Because Pouncy was not requesting the curative instruction, the trial court determined that she would not give the instruction. *Id.* She further asked that neither party mention it in closing. *Id.*

A curative instruction to strike the testimony was clearly available to Pouncy and he chose not to ask for it. Under these circumstances Pouncy has failed to preserve the error, if any, in admitting the impeachment evidence. A party must object to any irregularities and request remedial action *before* the case is submitted to the jury. *Spratt v. Davidson*, 1 Wash.App. 523, 526, 463 P.2d 179 (1969); *see Cerjance v. Kehres*, 26 Wash.App. 436, 441, 613 P.2d 192 (1980). A party "may not remain silent when it is time to speak, and then urge [the argument] for the first time on a motion for a new trial." *Agranoff v. Morton*, 54 Wash.2d 341, 346-47, 340 P.2d 811 (1959).

It is an increasingly common practice for trial counsel to invite

error by remaining silent when presented by a trial court with options to cure error. Because "[a] curative instruction will often cure any prejudice that has resulted from an alleged impropriety," *State v. Pastrana*, 94 Wash.App. 463, 479, 972 P.2d 557 (1999), this court should make it clear a practice of "hedging bets" fails to preserve error. For this reason alone, review of this case is appropriate.

C. **The Court of Appeals Acted Contrary to Washington Precedent When It Failed to Conduct a Harmless Error Analysis**

An evidentiary error is reversible only if, within reasonable probabilities, the error materially affected the outcome of the trial. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). In other words, "[e]rror is harmless unless the improper cross-examination was sufficient to affect the outcome of the trial." *State v. Lopez*, 95 Wash.App. 842, 856, 980 P.2d 224 (1999). Here, the Court of Appeals decision conflicted with this court's precedent by failing to conduct a harmless error analysis. When viewed in context, even if error, the impeachment of Dr. Wollert with the Yakima findings was harmless error.

Impeachment was against an expert, not against Pouncy. It is unusual to reverse a case for impeachment evidence because of its nonsubstantive nature. Nevertheless, harmless error is all the more

unlikely when the impeachment evidence is against a witness, rather than against Pouncy himself. *See United States v. Huddleston*, 811 F.2d 974, 978 (6th Cir.1987) ("Any prejudice to the defendant is normally greater where the defendant's own character is being attacked.").

The impeachment was cumulative and admitted by the expert.

The impeachment evidence from Yakima went to the question of whether Wollert's theories were generally accepted in the scientific community. As noted above, Wollert acknowledged that his theories were rejected by the two leading experts in the field -- Drs. Hanson and Doren. He further admitted that he was the only expert using his theories. In this context, admission of the Yakima findings merely confirmed what Wollert had already admitted and was cumulative to the other impeachment evidence. By definition, this is harmless error.

No reference was made in closing. In accord with the trial court's direction, the prosecutor made no reference to the Yakima impeachment evidence in closing. The lack of emphasis in closing supports a harmless error conclusion. *U.S. v. Logan*, 998 F.2d 1025, 1032, 302 U.S.App.D.C. 390 (C.A.D.C.,1993)

The jury was instructed that it was the sole judge of credibility.

A concern with judicial documents is that the jury will give undue weight

to the judges determination of credibility. In this case, however, the jury was specifically instructed that "[y]ou are the *sole judges of the credibility of the witness*" CP 987. Juries are presumed to follow the court's instructions. *State v. Pastrana*, 94 Wash.App. 463, 480, 972 P.2d 557 (1999). As a result, there is little likelihood that the Yakima findings had any undo influence on the jury.

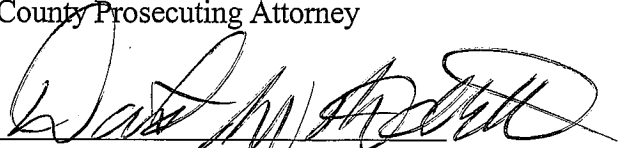
The State's case was overwhelming. Pouncy was not a close civil commitment case. The State's evidence demonstrated a long history of sexually violent predation followed by failed treatment and more predation. It is difficult to believe that a few questions buried in the middle of a long cross-examination of a marginal defense expert made the difference to the jury's verdict.

V. CONCLUSION

For the foregoing reasons, the State asks that the court accept review of the Court of Appeals opinion in this case.

DATED this 18th day of June, 2008.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

)	
)	DIVISION ONE
IN THE MATTER OF THE DETENTION))	
)	No. 59034-1-I
)	
OF CURTIS N. POUNCY.)	
)	PUBLISHED OPINION
)	
)	
)	FILED: May 19, 2008
_____)	

DWYER, J. — Curtis Pouncy appeals from an order authorizing his commitment as a sexually violent predator (SVP) pursuant to chapter 71.09 RCW, the sexually violent predator act. He raises four assignments of error: (1) that his right to a unanimous jury verdict was violated; (2) that the trial court erred by not instructing the jury on the definition of “personality disorder;” (3) that the trial court improperly commented on the evidence; and (4) that the trial court erred by allowing Pouncy’s expert witness to be impeached through the use of findings of fact entered in an unrelated Yakima County Superior Court matter. Finding merit in the latter contention, we reverse.

On April 1, 2003, the State filed a petition seeking Pouncy's commitment pursuant to chapter 71.09 RCW. A commitment proceeding was held before a jury.

To establish that Pouncy was a sexually violent predator, the State was required to prove the following elements beyond a reasonable doubt: (1) that Pouncy had been convicted of or charged with a crime of sexual violence; (2) that Pouncy suffered from a mental abnormality¹ or personality disorder; and (3) that such mental abnormality or personality disorder made Pouncy likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(16); In re Det. of Audett, 158 Wn.2d 712, 727, 147 P.3d 982 (2006) (quoting In re Det. of Thorell, 149 Wn.2d 724, 758-59, 72 P.3d 708 (2003)).

Dr. Richard Packard, a licensed psychologist and certified sex offender treatment provider, testified on behalf of the State. Dr. Richard Wollert, a clinical psychologist, testified on behalf of Pouncy. Dr. Packard opined that Pouncy suffered from a mental abnormality called paraphilia, not otherwise specified, nonconsent (paraphilia NOS nonconsent). Dr. Packard also diagnosed Pouncy with anti-social personality disorder.

During the trial there was much testimony regarding pedophilia, including Pouncy's treatment, or lack thereof, for pedophilia. Dr. Packard, the State's

¹ Mental abnormality is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." RCW 71.09.020(8).

expert, testified that there was "evidence indicating that it's reasonable" to consider the possibility that Pouncy suffered from pedophilia. Verbatim Report of Proceedings (VRP) (Sept. 26, 2006) at 23-26. Dr. Packard testified to incidents in Pouncy's past history that were "pretty strongly suggestive that pedophilia may also be a problem for him." VRP (Sept. 26, 2006) at 23-26. However, Dr. Packard testified that he "did not conclude that Mr. Pouncy definitely has pedophilia." VRP (Sept. 26, 2006) at 26. Pouncy did not object at trial to this testimony concerning pedophilia.

Dr. Packard also opined that Pouncy was likely to reoffend. Dr. Wollert disagreed and further opined that Pouncy did not suffer from a mental abnormality or personality disorder. In addition, the experts disputed the validity and reliability of the paraphilia NOS nonconsent diagnosis, as well as whether Pouncy met the criteria for having anti-social personality disorder.

In cross-examination, after challenging Dr. Wollert's adherence to the "Null hypothesis,"² the State questioned him about findings of fact made by a Yakima County Superior Court judge in an unrelated proceeding:

Q. And you're aware, are you not, of who Dr. Hanson is?

A. Yes.

Q. And Dr. Hanson is the person that developed the Static 99, the only instrument that you used in this case, right?

A. Yes.

Q. And Dr. Hanson was specifically asked about your technique of using the Null hypothesis testing in SVP evaluation, right?

A. Yes.

² Dr. Wollert explained that applying the Null hypothesis to his analysis amounted to approaching his evaluation of Pouncy with the initial assumption that Pouncy was not an SVP and adhering to this belief until the available evidence demonstrated otherwise.

Q. And I'm going to hand you what's been marked Exhibit 155. That's a letter from Dr. Hanson, right?

A. Yes, it is.

Q. On page two of that letter, Dr. Hanson states: Dr. Wollert's criticism of Dr. Rawlings, another evaluator, were from the standpoint of the Null logic model of hypothesis testing, quote unquote. To my knowledge, this Null hypothesis approach to psychological evaluations as presented by Dr. Wollert is original to Dr. Wollert. That's what Dr. Hanson said, right?

A. Yes, yes.

Q. And by his admission, it's not widely shared among other evaluators, right?

A. Yes.

Q. And he goes on to say that, although Dr. Wollert claims the Null hypothesis approach is superior to other models, I was not convinced that his approach is an improvement over existing practice or that it has a robust logical foundation.

A. That's what he says.

Q. And then he goes on to say, in particular, the logical basis of the default position, Null hypothesis, is not given by the model. Why, for example, should the default position be that an offender does not meet criteria, rather than the default position being that an offender meets criteria, particularly when an offender has previously been determined to meet the criteria? So that was Dr. Hanson's response to this Null hypothesis testing, right?

A. That's what he wrote, yes.³

....

Q. You testified in a case of In Re: Robinson, right?

A. Yes.

Q. Do you recall that case?

A. It's quite some time ago. I recall—I recall portions of it, but certainly not all of it.

Q. In that case you testified about the Null hypothesis testing approach that you used, right?

A. Yes.

Q. And I asked you about this in your deposition, right?

A. Meaning what?

Q. I asked you about the Robinson case in your deposition?

A. Yes, you asked me about the Robinson case, yes.

Q. And when you say this was some time ago, the findings and conclusions came out in March of 2006, right?

A. Right. The testimony was some time before that.

³ On redirect examination, Dr. Wollert explained that he evaluated Pouncy before Pouncy was found to be an SVP and that the Null hypothesis is not applied when evaluating a person who has already been determined to be an SVP.

Q. And in the Robinson case—I'm going to hand you what's been marked Exhibit 156. I want you to look at finding of fact number 19, which is on page four.

A. Yes.

Q. And it states, Dr. Wollert's methods of assessing the impact of age on recidivism are generally not accepted in the—
[DEFENSE COUNSEL]: Objection, Your Honor, foundation.

THE COURT: On that basis the objection is overruled.

Q. In the community of mental health professionals who evaluate and assess persons in SVP matters. This includes his use of Bayes theorem⁴ and Null hypothesis, right?

A. Yes, that's what the judge signed.

Q. And that's the finding of fact in this case, that your methodologies are not generally accepted in the scientific community, right?

A. That is what the judge signed.

Q. And when I asked you about that in your deposition, you said, geez, I didn't even know anything about that, right?

A. Right. I had not received a copy of that, so that it was new information to me, yes.

VRP (Oct. 10, 2006) at 157-61. Later, the State returned to the prior judicial factual findings during continued cross-examination of Dr. Wollert:

Q. You testified in the Robinson case, right?

A. Yes.

Q. We've talked about that before?

A. We have.

Q. We've talked about the court's finding that you—your Null hypothesis testing was not generally accepted in the scientific community, correct?

A. That is what the judge—that one judge signed off on, yes.

Q. That one judge also signed off on that same statement regarding the Bayes theorem, right?

A. That's right.

Q. Dr. Wollert's methods of assessing the impact of age on sexual recidivism are not generally accepted in the community of mental health professionals who evaluate and assess persons in SVP matters. This includes his use of Bayes theorem and Null hypothesis, right?

⁴ Dr. Wollert testified that the Bayes theorem is a formula that he used to recalibrate actuarial tests so that they more accurately estimate the sexual recidivism rate for offenders of different ages.

A. That's what the judge signed off on.

VRP (Oct. 11, 2006) at 35-36. On redirect examination, Dr. Wollert stated that he had testified in many cases in which he referenced both the Null hypothesis and the Bayes theorem subsequent to the issuance of the Yakima court's factual findings in the Robinson matter.

Later in the trial, the State informed the trial court that it intended to seek the introduction of evidence of another court's factual findings from yet another prior unrelated case in which it was concluded that one of Pouncy's witnesses, a private investigator, was not credible. The trial court excluded the evidence, reasoning:

It is not appropriate for a witness to testify as to the credibility of another witness, and I would—and I don't find this relevant, unless somehow an issue of bias is raised. Had [defense counsel] objected on the issue of relevance to the findings of the Yakima judge, I would have sustained that objection.

VRP (Oct. 11, 2006) at 140.

In closing argument, the State discussed the issue of pedophilia, without objection from Pouncy.

II

Pouncy first contends that because the State presented evidence of alternative means to prove the mental illness element of RCW 71.09.020, while failing to introduce substantial evidence as to each alternative, he was denied his right to a unanimous jury verdict. We disagree.

The right to a unanimous jury verdict applies in SVP civil commitment hearings. RCW 71.09.060(1); In re Det. of Keeney, 141 Wn. App. 318, 327, 169

P.3d 852 (2007). Principles regarding the right to unanimous jury verdicts in criminal proceedings apply equally in SVP civil commitment hearings. In re Det. of Halgren, 156 Wn.2d 795, 809-11, 132 P.3d 714 (2006); Keeney, 141 Wn. App. at 327. One such principle is the rule that

when there is a single offense committable in more than one way, "it is unnecessary to a guilty verdict that there be more than unanimity concerning guilt as to the single crime charged . . . regardless of unanimity as to the means by which the crime is committed provided there is substantial evidence to support each of the means charged."

Halgren, 156 Wn.2d at 809 (quoting State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976)).

Specifically, Pouncy contends that the State offered three alternative evidentiary theories in support of its contention that Pouncy suffered from a personality disorder or mental abnormality: (1) that Pouncy suffered from a personality disorder (anti-social personality disorder); (2) that Pouncy suffered from the mental abnormality of paraphilia NOS nonconsent; and (3) that Pouncy suffered from the mental abnormality of pedophilia. Thus, he argues, the State was required, but failed, to establish by substantial evidence that Pouncy suffered from each⁵ of these three alleged alternative means of proving that Pouncy suffered from a mental abnormality or personality disorder in order for the jury's verdict to be considered to be unanimous.

Pouncy's claim is unavailing, however, because the alternative means analysis does not apply to circumstances involving "means within a means."

⁵ Pouncy concedes that the diagnoses of paraphilia NOS nonconsent and anti-social personality disorder were supported by substantial evidence, but notes that Dr. Packard testified that he did not conclude that Pouncy "definitely has pedophilia." VRP (Sept. 26, 2006) at 26.

State v. Al-Hamdani, 109 Wn. App. 599, 604, 36 P.3d 1103 (2001) (citing In re the Pers. Restraint of Jeffries, 110 Wn.2d 326, 752 P.2d 1338 (1988)).

Proof that a respondent in an SVP proceeding suffers from a “mental abnormality” or proof that such a respondent suffers from a “personality disorder” constitute the two distinct means of establishing the mental illness element of the SVP determination. Halgren, 156 Wn.2d at 811. “Mental abnormality” and “personality disorder” are the two factual alternatives set forth in the relevant statute. Halgren, 156 Wn.2d at 811. See RCW 71.09.020(16).

In In re the Personal Restraint of Jeffries, 110 Wn.2d 326, 752 P.2d 1338 (1988), a jury found by special verdict that two statutory aggravating circumstances had been proven. They were:

That the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime.

....

There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant.

Jeffries, 110 Wn.2d at 339 n.30 (quoting from special verdict form). The verdict form was based on the two statutory aggravating circumstances elucidated in former RCW 10.95.020(7) and (8) (1981), as set forth in the jury instructions.

Jeffries, 110 Wn.2d at 338 n.29. On collateral review, Jeffries argued that the jury was required to unanimously agree that he had committed the murder either “to conceal the commission of a crime,” or “to protect the identity of any person committing a crime,” or “to conceal the identity of any person committing a crime.” Jeffries, 110 Wn.2d at 339-40. The Supreme Court rejected this

argument as improperly creating “means within means.” Jeffries, 110 Wn.2d at 339-40.

Instead, the Supreme Court held that the trial court had properly instructed the jury that it was required to unanimously agree as to whether either of the two statutory alternatives, former RCW 10.95.020(7) or (8), were proved beyond a reasonable doubt. Jeffries, 110 Wn.2d at 339-40. The Supreme Court concluded that there was no requirement to further instruct the jury. Jeffries, 110 Wn.2d at 339-40. In other words, “[a]lthough the jury must be unanimous as to the alternative circumstances satisfying aggravated murder, it was not required to unanimously agree as to facts (alternative ways) satisfying each of the alternative circumstances.” State v. Strohm, 75 Wn. App. 301, 308 n.3, 879 P.2d 962 (1994) (citing Jeffries, 110 Wn.2d at 339-340).

Following Jeffries, we have consistently held that there is no requirement of unanimity with regard to “means within means.” See, e.g., Al-Hamdani, 109 Wn. App. at 607; State v. Laico, 97 Wn. App. 759, 763, 987 P.2d 638 (1999); Strohm, 75 Wn. App. at 309.

Here, the jury was properly instructed that it must unanimously agree as to whether either of the two alternative means, mental abnormality or personality disorder, were proved beyond a reasonable doubt.⁶ No further instruction as to unanimity was required.

⁶ Relevant portions of Instruction No. 3 reads:

To establish that the respondent, Curtis Pouncy, is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:

....

Where a rational trier of fact could have found beyond a reasonable doubt that Pouncy suffered from both a mental abnormality and a personality disorder, Pouncy's constitutional right to jury unanimity was not violated. See Halgren, 156 Wn.2d at 811. Here, Pouncy correctly concedes that substantial evidence was presented to support a jury finding that he suffered from both paraphilia NOS nonconsent and anti-social personality disorder. Thus, there was no error.

III

Pouncy next assigns error to the trial court's decision not to instruct the jury with his proposed definition of "personality disorder."⁷

Whether to give a proposed instruction is within the discretion of the trial court and is reviewed for an abuse of discretion. In re Det. of Greenwood, 130 Wn. App. 277, 287, 122 P.3d 747 (2005), rev. denied, 158 Wn.2d 1010 (2006); In re Det. of Twining, 77 Wn. App. 882, 895, 894 P.2d 1331 (1995). Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. Greenwood, 130 Wn. App. at 287; Twining, 77 Wn. App. at 894 (citing Caruso v. Local 690, Int'l Bhd. of Teamsters, 107 Wn.2d 524, 529, 730 P.2d 1299 (1987)).

That Curtis Pouncy suffers from a mental abnormality and/or a personality disorder which causes serious difficulty in controlling his sexually violent behavior.
Clerk's Papers (CP) at 991.

⁷ Pouncy proposed defining "personality disorder" as: "A Personality Disorder is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment." CP at 730.

The argument advanced by Pouncy was previously rejected in Twining, 77 Wn. App. at 895-96. The trial court did not abuse its discretion by following authority of such long-standing duration.

IV

Pouncy next contends that the trial court improperly commented on the evidence by admitting testimony about the Yakima court's factual findings, critical of Dr. Wollert's methodology, from an unrelated proceeding. Pouncy argues, without supporting authority, that "a judicial comment on the evidence does not cease to be one simply because the comment comes from a judge that is not presiding over the trial." Br. of Appellant at 14. The State, relying on State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995), counters that testimony regarding the Yakima court's factual findings was simply evidence, and that the trial court ruled on its admissibility without displaying to the jury the trial court's attitude about the merits of the case. Thus, the State contends, the trial court did not comment on the evidence. We agree with the State.

The Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." CONST. art. IV, § 16. "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury."

Lane, 125 Wn.2d at 838 (emphasis added). “The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge’s opinion from influencing the jury.” Lane, 125 Wn.2d at 838 (emphasis added). A court does not comment on the evidence simply by giving its reasons for a ruling. State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005), rev. denied, 156 Wn.2d 1004 (2006) (citing State v. Cerny, 78 Wn.2d 845, 855-56, 480 P.2d 199 (1971)).

In Gentry, the defendant contended that the admission of the defendant’s judgment and sentence form from a prior case was an improper comment on the evidence because the judge’s signature on the judgment and sentence form demonstrated that the sentencing judge from the prior case was the current trial judge. Gentry, 125 Wn.2d at 638. Our Supreme Court rejected this argument, noting that “the judgment and sentence of the prior rape was not a comment on the evidence; it was the evidence.” Gentry, 125 Wn.2d at 639. The court stated that “[t]he admission of evidence, standing alone, cannot be considered an unconstitutional comment on the evidence.” Gentry, 125 Wn.2d at 639.

Here, the trial court’s admission of the Yakima court’s factual findings did not constitute an unconstitutional comment on the evidence. The trial court did not improperly comment on the evidence simply by making an evidentiary ruling on admissibility. Pouncy’s claim, therefore, fails.

V

Pouncy is correct, however, in contending that the testimony concerning the Yakima court’s findings of fact was improperly admitted. His objection to that testimony should have been sustained.

The cross-examination leading to the State's questions concerning the Yakima court's factual findings was focused on attacking Dr. Wollert's methodology. The State first confirmed that Dr. Wollert used the Null hypothesis in evaluating Pouncy. Next, the State had Dr. Wollert confirm that another expert in the field, Dr. Hanson, opined in a letter that Dr. Wollert's use of the Null hypothesis was unique to him. Then, the State elicited testimony that Dr. Hanson "was not convinced that [Dr. Wollert's] approach is an improvement over existing practice or that it has a robust logical foundation." VRP (Oct. 10, 2006) at 158.

At this point, the State began its questioning regarding the Yakima court's factual findings by eliciting confirmation from Dr. Wollert that he had "testified in a case of In Re: Robinson," that he had testified about the Null hypothesis in the Robinson case, and that the Robinson matter's factual "findings and conclusions came out in March of 2006." VRP (Oct. 10, 2006) at 159-60. The State then handed Dr. Wollert a proposed exhibit identified as "156." The State then directed Dr. Wollert to "look at finding of fact number 19" in the proposed exhibit while commenting that "it states, 'Dr. Wollert's methods of assessing the impact of age on recidivism are generally not accepted in the'—" VRP (Oct. 10, 2006) at 160-61. At this point, defense counsel interposed an objection on the basis of foundation.

Viewed in context, it is apparent that the State was seeking to introduce the Robinson findings of fact on the question of whether Dr. Wollert, an expert witness, had acted consistent with the standards of his profession in interviewing

and evaluating Pouncy. This is a matter for expert testimony, not lay testimony. See State v. Willis, 151 Wn.2d 255, 87 P.3d 1164 (2004). Again, viewed in context, it is apparent that Pouncy's counsel's objection to the questioning, based on a lack of foundation, was premised upon the State's failure to qualify the Yakima judge as an expert witness in the areas of sex offender evaluation and psychology. This objection was properly made.

The admission of expert testimony is governed by ER 702, which provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Before testifying as an expert, the witness is subject to the requirements of ER 702. State v. Lord, 161 Wn.2d 276, 294 n.15, 165 P.3d 1251 (2007). Thus, expert testimony is admissible under ER 702 where (1) the witness qualifies as an expert and (2) the expert's testimony would be helpful to the trier of fact. State v. Riker, 123 Wn.2d 351, 364, 869 P.2d 43 (1994). "Judges do not have the expertise required to decide whether a challenged scientific theory is correct." State v. Wilbur-Bobb, 134 Wn. App. 627, 632, 141 P.3d 665 (2006). Pouncy's objection should have been sustained.

Later in the trial, the court mentioned that it would have sustained Pouncy's objection had it been made on the basis of relevance. This would have also been a proper basis for objection. Our Supreme Court has previously

explained the relationship between relevance and ER 702's helpfulness requirement:

Helpfulness and relevancy are intricately intertwined:

"The helpfulness test subsumes a relevancy analysis. In making its determination, the court must proceed on a case-by-case basis. Its conclusions will depend on (1) the court's evaluation of the state of knowledge presently existing about the subject of the proposed testimony and (2) on the court's appraisal of the facts of the case."

Riker, 123 Wn.2d at 364 (quoting State v. Reynolds, 235 Neb. 662, 683, 457 N.W.2d 405, 419 (1990)). It is apparent that where opinion testimony is given by a witness who is not qualified to testify to such an opinion, the testimony given is, by definition, not helpful to the finder of fact.

Here, the trial court was correct when it mused in reflection that the Yakima court's factual findings were not relevant. At the same time, Pouncy's objection based on lack of foundation was also correctly interposed. That objection should have been sustained.

On appeal, the State attempts to justify its questioning about the Yakima court's factual findings as simply being appropriate cross-examination of Dr. Wollert. We further address this situation to reinforce that this is not so.

In addition to the two grounds previously discussed, testimony about and evidence of the Yakima court's factual findings were also inadmissible because such testimony or evidence constituted hearsay. Hearsay is an oral or written assertion, "other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless it falls within certain exceptions. ER 802.

Hearsay may not be incorporated into questions asked for impeachment purposes. Washington Irrigation & Dev. Co. v. Sherman, 106 Wn.2d 685, 687-88, 724 P.2d 997 (1986).

It is well-established that “[j]udicial findings in other cases proffered as evidence are generally characterized as inadmissible hearsay. See, e.g., McCormick on Evidence § 318, at p. 894 (3d ed.1984): No specific exceptions apply under the Federal Rules of Evidence.” Blue Cross & Blue Shield of N.J., Inc. v. Phillip Morris, Inc., 141 F. Supp. 2d 320, 323 (E.D.N.Y. 2001). Accord Nipper v. Snipes, 7 F.3d 415, 417 (4th Cir. S.C.1993); Greycas, Inc. v. Proud, 826 F.2d 1560, 1567 (7th Cir. Ill. 1987). Moreover, as noted in the Blue Cross case, “[e]xcluding credibility assessing statements by judges in other cases avoids the practical difficulty of weighing judicial opinions against contrary evidence.” Blue Cross, 141 F. Supp. 2d at 323. Indeed, the “difficulty in assessing the probative force of comments by a judge on the credibility of a witness is especially great for a jury, which may give exaggerated weight to a judge’s supposed expertise on such matters.” Blue Cross, 141 F. Supp. 2d at 323.

The inappropriateness of seeking the introduction of such testimony has long been recognized:

The obvious purpose was to induce the jury to believe that, as the testimony of the witness as given before them had already been discredited by three judges sitting in the same court in another case, that, therefore, they should discredit it in this case, a wholly unwarranted conclusion unsupported by any authority with which we are familiar.

Newton v. State, 147 Md. 71, 127 A. 123, 131 (1924).

As the Blue Cross court discussed:

Unlike the scientific community's process of peer review, there is no practical way for a scientist to defend against a judge's assessments of credibility. Accordingly, courts have also excluded out-of-court statements by judges under Rule 403 (undue prejudice) and Rule 605 (prohibiting judges as witnesses).

Blue Cross, 141 F. Supp. 2d at 324. As artfully summarized in that case:

The proposed evidence is inadmissible. It is also unfair. When a judge attacks a witness there is no effective defense. Peer review of such witnesses is different; if an expert does not act properly that expert ought to be attacked in the normal course of scientific debate—or in the case of a trial, with the opportunity for rehabilitation and explanation. To appropriately meet the evaluations of another judge would require the jury to delve deeply into the case that judge was trying. This enterprise is not appropriate under Rule 403.

....
In this case the cross examination of the witness was blistering and lasted more than a full trial day. An extensive deposition and exchange of reports provided ample fuel for the broad-based attack on the expert's credibility. Defendants' experts will continue the attack. They do not need another judge as an ally.

Blue Cross, 141 F. Supp. 2d at 325.⁸

⁸ In his opening brief, Pouncy assigns error to the admission of this evidence. However, his issue statements focus on two claims: (1) admission of the evidence constituted a comment on the evidence; and (2) his trial counsel provided ineffective assistance by objecting on the basis of foundation rather than relevance. This latter claim necessarily requires that we evaluate the propriety of trial counsel's action. As discussed, we conclude that trial counsel's objection was well-taken.

Under these circumstances, in which the issue was directly addressed to the trial court but only indirectly addressed to us, it is appropriate that we resolve the issue. See Falk v. Keene Corp., 113 Wn.2d 645, 659, 782 P.2d 974 (1989) ("An appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision."); Alverado v. Wash. Pub. Power Supply Sys., 111 Wn.2d 424, 429, 759 P.2d 427 (1998) (same); accord State v. Aho, 137 Wn.2d 736, 741, 975 P.2d 512 (1999) ("This court may raise an issue sua sponte and rest its decision on that issue."); Greengo v. Pub. Employees Mut. Ins. Co., 135 Wn.2d 799, 813, 959 P.2d 657 (1998) (same).

VI

For all of the reasons set forth above, the State's questions about, and utilization of, the Yakima court's findings of fact was improper. The trial court erred by allowing such questioning. Accordingly, a new trial is required.

Reversed.

Dwyer, A.C.J.

WE CONCUR:

Appelwick, J.

Becker, J.

Appendix 1

--- P.3d ---

--- P.3d ---, 2008 WL 2134339 (Wash.App. Div. 1)

(Cite as: --- P.3d ---, 2008 WL 2134339 (Wash.App. Div. 1))

In re Detention of Pouncy

Wash.App. Div. 1, 2008.

Only the Westlaw citation is currently available.

Court of Appeals of Washington, Division 1.

In the Matter of the DETENTION OF Curtis N.

POUNCY.

No. 59034-1-I.

May 19, 2008.

Background: Offender appealed order of the Superior Court, King County, Helen Halpert, authorizing his commitment as a sexually violent predator (SVP).

Holdings: The Court of Appeals, Dwyer, J., held that:

(1) jury was not required to unanimously agree as to which of three alleged alternative mental abnormalities or personality disorders defendant suffered from;

(2) evidentiary ruling admitting another court's findings of fact was not an improper comment on the evidence; but

(3) admission of judicial findings of fact from other proceedings criticizing expert witness's methodology was improper.

Reversed.

[1] Jury 230 ⚡32(4)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k32 Number of Jurors

230k32(4) k. Concurrence of Less Than Whole Number. Most Cited Cases

Jury in sexually violent predator (SVP) commitment proceedings, properly instructed that it must unanimously agree as to whether either of the two alternative means, mental abnormality or personality disorder, were proved beyond a reasonable doubt, was not required to unanimously agree as to

which of three alleged alternative mental abnormalities or personality disorders defendant suffered from. West's RCWA 71.09.020(16).

[2] Jury 230 ⚡32(4)

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k32 Number of Jurors

230k32(4) k. Concurrence of Less Than Whole Number. Most Cited Cases
Principles regarding the right to unanimous jury verdicts in criminal proceedings apply equally in sexually violent predator (SVP) civil commitment hearings. West's RCWA 71.09.060(1).

[3] Criminal Law 110 ⚡798(.7)

110 Criminal Law

110XX Trial

110XX(G) Instructions: Necessity, Requisites, and Sufficiency

110k798 Manner of Arriving at Verdict

110k798(.7) k. Unanimity as to Facts, Conduct, Methods, or Theories. Most Cited Cases
When there is a single offense committable in more than one way, it is unnecessary to a guilty verdict that there be more than unanimity concerning guilt as to the single crime charged regardless of unanimity as to the means by which the crime is committed provided there is substantial evidence to support each of the means charged.

[4] Mental Health 257A ⚡454

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak454 k. Persons and Offenses Included. Most Cited Cases

Proof that a respondent in an sexually violent predator (SVP) proceeding suffers from a "mental ab-

normality” or proof that such a respondent suffers from a “personality disorder” constitute the two distinct means of establishing the mental illness element of the SVP determination. West's RCWA 71.09.020(16).

[5] Appeal and Error 30 ⚡969

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k969 k. Conduct of Trial or Hearing in General. Most Cited Cases

Trial 388 ⚡182

388 Trial

388VII Instructions to Jury

388VII(A) Province of Court and Jury in General

388k182 k. Authority to Instruct Jury in General. Most Cited Cases

Whether to give a proposed instruction is within the discretion of the trial court and is reviewed for an abuse of discretion.

[6] Trial 388 ⚡203(1)

388 Trial

388VII Instructions to Jury

388VII(B) Necessity and Subject-Matter

388k203 Issues and Theories of Case in General

388k203(1) k. In General. Most Cited Cases

Trial 388 ⚡232(1)

388 Trial

388VII Instructions to Jury

388VII(C) Form, Requisites, and Sufficiency

388k231 Sufficiency as to Subject-Matter

388k232 In General

388k232(1) k. In General. Most Cited Cases

Trial 388 ⚡242

388 Trial

388VII Instructions to Jury

388VII(C) Form, Requisites, and Sufficiency

388k242 k. Confused or Misleading Instructions. Most Cited Cases

Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law.

[7] Mental Health 257A ⚡460(2)

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak460 Evidence

257Ak460(2) k. Experts. Most Cited Cases

Trial court's evidentiary ruling admitting testimony about another court's factual findings, critical of expert witness's methodology, from an unrelated proceeding was not improper comment on the evidence in sexually violent predator (SVP) proceedings.

[8] Trial 388 ⚡29(2)

388 Trial

388III Course and Conduct of Trial in General

388k29 Remarks of Judge

388k29(2) k. Comments on Evidence. Most Cited Cases

A statement by the court constitutes an improper comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. West's RCWA Const. Art. 4, § 16.

[9] Trial 388 ⚡29(3)

388 Trial

388III Course and Conduct of Trial in General

388k29 Remarks of Judge

388k29(3) k. Examination, Credibility, and Impeachment of Witnesses. Most Cited Cases

The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury. West's RCWA Const. Art. 4, § 16.

[10] Trial 388 ⚡29(2)

388 Trial

388III Course and Conduct of Trial in General

388k29 Remarks of Judge

388k29(2) k. Comments on Evidence.

Most Cited Cases

A court does not improperly comment on the evidence simply by giving its reasons for a ruling. West's RCWA Const. Art. 4, § 16.

[11] Mental Health 257A ⚡460(2)

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak460 Evidence

257Ak460(2) k. Experts. Most

Cited Cases

Factual findings of another trial court in unrelated proceedings, which findings were critical of expert witness's methodology, were not admissible in sexually violent predator (SVP) proceedings as evidence of whether expert had acted consistent with the standards of his profession in interviewing and evaluating offender, as judge in other proceedings had not been qualified as an expert witness in the areas of sex offender evaluation and psychology. ER 702.

[12] Evidence 157 ⚡508

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k508 k. Matters Involving Scientific or Other Special Knowledge in General. Most Cited Cases

Evidence 157 ⚡535

157 Evidence

157XII Opinion Evidence

157XII(C) Competency of Experts

157k535 k. Necessity of Qualification.

Most Cited Cases

Expert testimony is admissible where (1) the witness qualifies as an expert and (2) the expert's testimony would be helpful to the trier of fact. ER 702.

[13] Evidence 157 ⚡555.2

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k555 Basis of Opinion

157k555.2 k. Necessity and Sufficiency. Most Cited Cases

Judges do not have the expertise required to decide whether a challenged scientific theory is correct.

[14] Mental Health 257A ⚡460(2)

257A Mental Health

257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes

257Ak452 Sex Offenders

257Ak460 Evidence

257Ak460(2) k. Experts. Most

Cited Cases

Factual findings of another trial court in unrelated proceedings, which findings were critical of expert witness's methodology, were hearsay and thus not admissible in sexually violent predator (SVP) proceedings as evidence of whether expert had acted consistent with the standards of his profession in interviewing and evaluating offender. ER 801(c).

[15] Witnesses 410 ⚡331.5

410 Witnesses

410IV Credibility and Impeachment

410IV(A) In General

410k331.5 k. Competency of Impeaching Evidence in General. Most Cited Cases

Hearsay may not be incorporated into questions asked for impeachment purposes.

Casey Grannis, Christopher Gibson, Nielsen Broman & Koch, Seattle, for Appellant.

Barbara A. Flemming, Timothy A. Bradshaw, King County Prosecutor's Office, Seattle, for Respondent.

DWYER, J.

*1 ¶ 1 Curtis Pouncy appeals from an order authorizing his commitment as a sexually violent predator (SVP) pursuant to chapter 71.09 RCW, the sexually violent predator act. He raises four assignments of error: (1) that his right to a unanimous jury verdict was violated; (2) that the trial court erred by not instructing the jury on the definition of "personality disorder;" (3) that the trial court improperly commented on the evidence; and (4) that the trial court erred by allowing Pouncy's expertwitness to be impeached through the use of findings of fact entered in an unrelated Yakima County Superior Court matter. Finding merit in the latter contention, we reverse.

I

¶ 2 On April 1, 2003, the State filed a petition seeking Pouncy's commitment pursuant to chapter 71.09 RCW. A commitment proceeding was held before a jury.

¶ 3 To establish that Pouncy was a sexually violent predator, the State was required to prove the following elements beyond a reasonable doubt: (1) that Pouncy had been convicted of or charged with a crime of sexual violence; (2) that Pouncy suffered from a mental abnormality^{FN1} or personality disorder; and (3) that such mental abnormality or personality disorder made Pouncy likely to engage in predatory acts of sexual violence if not confined in a secure facility. RCW 71.09.020(16); *In re Det. of Audett*, 158 Wash.2d 712, 727, 147 P.3d 982 (2006) (quoting *In re Det. of Thorell*, 149 Wash.2d 724, 758-59, 72 P.3d 708 (2003)).

¶ 4 Dr. Richard Packard, a licensed psychologist and certified sex offender treatment provider, testified on behalf of the State. Dr. Richard Wollert, a clinical psychologist, testified on behalf of Pouncy. Dr. Packard opined that Pouncy suffered from a mental abnormality called paraphilia, not otherwise specified, nonconsent (paraphilia NOS nonconsent). Dr. Packard also diagnosed Pouncy with anti-social personality disorder.

¶ 5 During the trial there was much testimony regarding pedophilia, including Pouncy's treatment, or lack thereof, for pedophilia. Dr. Packard, the State's expert, testified that there was "evidence indicating that it's reasonable" to consider the possibility that Pouncy suffered from pedophilia. Verbatim Report of Proceedings (VRP) (Sept. 26, 2006) at 23-26. Dr. Packard testified to incidents in Pouncy's past history that were "pretty strongly suggestive that pedophilia may also be a problem for him." VRP (Sept. 26, 2006) at 23-26. However, Dr. Packard testified that he "did not conclude that Mr. Pouncy definitely has pedophilia." VRP (Sept. 26, 2006) at 26. Pouncy did not object at trial to this testimony concerning pedophilia.

¶ 6 Dr. Packard also opined that Pouncy was likely to reoffend. Dr. Wollert disagreed and further opined that Pouncy did not suffer from a mental abnormality or personality disorder. In addition, the experts disputed the validity and reliability of the paraphilia NOS nonconsent diagnosis, as well as whether Pouncy met the criteria for having anti-social personality disorder.

*2 ¶ 7 In cross-examination, after challenging Dr. Wollert's adherence to the "Null hypothesis,"^{FN2} the State questioned him about findings of fact made by a Yakima County Superior Court judge in an unrelated proceeding:

Q. And you're aware, are you not, of who Dr. Hanson is?

A. Yes.

Q. And Dr. Hanson is the person that developed the Static 99, the only instrument that you used in this case, right?

A. Yes.

Q. And Dr. Hanson was specifically asked about your technique of using the Null hypothesis testing in SVP evaluation, right?

A. Yes.

Q. And I'm going to hand you what's been marked Exhibit 155. That's a letter from Dr. Hanson, right?

A. Yes, it is.

Q. On page two of that letter, Dr. Hanson states: Dr. Wollert's criticism of Dr. Rawlings, another evaluator, were from the standpoint of the Null logic model of hypothesis testing, quote unquote. To my knowledge, this Null hypothesis approach to psychological evaluations as presented by Dr. Wollert is original to Dr. Wollert. That's what Dr. Hanson said, right?

A. Yes, yes.

Q. And by his admission, it's not widely shared among other evaluators, right?

A. Yes.

Q. And he goes on to say that, although Dr. Wollert claims the Null hypothesis approach is superior to other models, I was not convinced that his approach is an improvement over existing practice or that it has a robust logical foundation.

A. That's what he says.

Q. And then he goes on to say, in particular, the logical basis of the default position, Null hypothesis, is not given by the model. Why, for example, should the default position be that an offender does not meet criteria, rather than the default position being that an offender meets criteria,

particularly when an offender has previously been determined to meet the criteria? So that was Dr. Hanson's response to this Null hypothesis testing, right?

A. That's what he wrote, yes.^{FN3}

....

Q. You testified in a case of In Re: Robinson, right?

A. Yes.

Q. Do you recall that case?

A. It's quite some time ago. I recall-I recall portions of it, but certainly not all of it.

Q. In that case you testified about the Null hypothesis testing approach that you used, right?

A. Yes.

Q. And I asked you about this in your deposition, right?

A. Meaning what?

Q. I asked you about the Robinson case in your deposition?

A. Yes, you asked me about the Robinson case, yes.

Q. And when you say this was some time ago, the findings and conclusions came out in March of 2006, right?

A. Right. The testimony was some time before that.

Q. And in the Robinson case-I'm going to hand you what's been marked Exhibit 156. I want you to look at finding of fact number 19, which is on page four.

A. Yes.

Q. And it states, Dr. Wollert's methods of assessing the impact of age on recidivism are generally not accepted in the-

[DEFENSE COUNSEL]: Objection, Your Honor, foundation.

*3 THE COURT: On that basis the objection is overruled.

Q. In the community of mental health professionals who evaluate and assess persons in SVP matters. This includes his use of Bayes theorem FN4 and Null hypothesis, right?

A. Yes, that's what the judge signed.

Q. And that's the finding of fact in this case, that your methodologies are not generally accepted in the scientific community, right?

A. That is what the judge signed.

Q. And when I asked you about that in your deposition, you said, geez, I didn't even know anything about that, right?

A. Right. I had not received a copy of that, so that it was new information to me, yes.

VRP (Oct. 10, 2006) at 157-61. Later, the State returned to the prior judicial factual findings during continued cross-examination of Dr. Wollert:

Q. You testified in the Robinson case, right?

A. Yes.

Q. We've talked about that before?

A. We have.

Q. We've talked about the court's finding that you-your Null hypothesis testing was not generally accepted in the scientific community, correct?

A. That is what the judge-that one judge signed off on, yes.

Q. That one judge also signed off on that same statement regarding the Bayes theorem, right?

A. That's right.

Q. Dr. Wollert's methods of assessing the impact of age on sexual recidivism are not generally accepted in the community of mental health professionals who evaluate and assess persons in SVP matters. This includes his use of Bayes theorem and Null hypothesis, right?

A. That's what the judge signed off on.

VRP (Oct. 11, 2006) at 35-36. On redirect examination, Dr. Wollert stated that he had testified in many cases in which he referenced both the Null hypothesis and the Bayes theorem subsequent to the issuance of the Yakima court's factual findings in the Robinson matter.

¶ 8 Later in the trial, the State informed the trial court that it intended to seek the introduction of evidence of another court's factual findings from yet another prior unrelated case in which it was concluded that one of Pouncy's witnesses, a private investigator, was not credible. The trial court excluded the evidence, reasoning:

It is not appropriate for a witness to testify as to the credibility of another witness, and I would-and I don't find this relevant, unless somehow an issue of bias is raised. Had [defense counsel] objected on the issue of relevance to the findings of the Yakima judge, I would have sustained that objection.

VRP (Oct. 11, 2006) at 140.

¶ 9 In closing argument, the State discussed the issue of pedophilia, without objection from Pouncy.

II

[1] ¶ 10 Pouncy first contends that because the State presented evidence of alternative means to prove the mental illness element of RCW 71.09.020,

while failing to introduce substantial evidence as to each alternative, he was denied his right to a unanimous jury verdict. We disagree.

[2][3]¶ 11 The right to a unanimous jury verdict applies in SVP civil commitment hearings. RCW 71.09.060(1); *In re Det. of Keeney*, 141 Wash.App. 318, 327, 169 P.3d 852 (2007). Principles regarding the right to unanimous jury verdicts in criminal proceedings apply equally in SVP civil commitment hearings. *In re Det. of Halgren*, 156 Wash.2d 795, 809-11, 132 P.3d 714 (2006); *Keeney*, 141 Wash.App. at 327, 169 P.3d 852. One such principle is the rule that

*4 when there is a single offense committable in more than one way, "it is unnecessary to a guilty verdict that there be more than unanimity concerning guilt as to the single crime charged ... regardless of unanimity as to the means by which the crime is committed provided there is substantial evidence to support each of the means charged."

Halgren, 156 Wash.2d at 809, 132 P.3d 714 (quoting *State v. Arndt*, 87 Wash.2d 374, 377, 553 P.2d 1328 (1976)).

¶ 12 Specifically, Pouncy contends that the State offered three alternative evidentiary theories in support of its contention that Pouncy suffered from a personality disorder or mental abnormality: (1) that Pouncy suffered from a personality disorder (anti-social personality disorder); (2) that Pouncy suffered from the mental abnormality of paraphilia NOS nonconsent; and (3) that Pouncy suffered from the mental abnormality of pedophilia. Thus, he argues, the State was required, but failed, to establish by substantial evidence that Pouncy suffered from each ^{FNS} of these three alleged alternative means of proving that Pouncy suffered from a mental abnormality or personality disorder in order for the jury's verdict to be considered to be unanimous.

¶ 13 Pouncy's claim is unavailing, however, because the alternative means analysis does not apply

to circumstances involving "means within a means." *State v. Al-Hamdani*, 109 Wash.App. 599, 604, 36 P.3d 1103 (2001) (citing *In re the Pers. Restraint of Jeffries*, 110 Wash.2d 326, 752 P.2d 1338 (1988)).

[4]¶ 14 Proof that a respondent in an SVP proceeding suffers from a "mental abnormality" or proof that such a respondent suffers from a "personality disorder" constitute the two distinct means of establishing the mental illness element of the SVP determination. *Halgren*, 156 Wash.2d at 811, 132 P.3d 714. "Mental abnormality" and "personality disorder" are the two factual alternatives set forth in the relevant statute. *Halgren*, 156 Wash.2d at 811, 132 P.3d 714. See RCW 71.09.020(16).

¶ 15 In *In re the Personal Restraint of Jeffries*, 110 Wash.2d 326, 752 P.2d 1338 (1988), a jury found by special verdict that two statutory aggravating circumstances had been proven. They were:

That the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime.

....

There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant.

Jeffries, 110 Wash.2d at 339 n. 30, 752 P.2d 1338 (quoting from special verdict form). The verdict form was based on the two statutory aggravating circumstances elucidated in former RCW 10.95.020(7) and (8) (1981), as set forth in the jury instructions. *Jeffries*, 110 Wash.2d at 338 n. 29, 752 P.2d 1338. On collateral review, *Jeffries* argued that the jury was required to unanimously agree that he had committed the murder either "to conceal the commission of a crime," or "to protect the identity of any person committing a crime," or "to conceal the identity of any person committing a crime." *Jeffries*, 110 Wash.2d at 339-40, 752 P.2d 1338. The

Supreme Court rejected this argument as improperly creating "means within means." *Jeffries*, 110 Wash.2d at 339-40, 752 P.2d 1338.

*5 ¶ 16 Instead, the Supreme Court held that the trial court had properly instructed the jury that it was required to unanimously agree as to whether either of the two statutory alternatives, former RCW 10.95.020(7) or (8), were proved beyond a reasonable doubt. *Jeffries*, 110 Wash.2d at 339-40, 752 P.2d 1338. The Supreme Court concluded that there was no requirement to further instruct the jury. *Jeffries*, 110 Wash.2d at 339-40, 752 P.2d 1338. In other words, "[a]lthough the jury must be unanimous as to the alternative circumstances satisfying aggravated murder, it was not required to unanimously agree as to facts (alternative ways) satisfying each of the alternative circumstances." *State v. Strohm*, 75 Wash.App. 301, 308 n. 3, 879 P.2d 962 (1994) (citing *Jeffries*, 110 Wash.2d at 339-340, 752 P.2d 1338).

¶ 17 Following *Jeffries*, we have consistently held that there is no requirement of unanimity with regard to "means within means." See, e.g., *Al-Hamdani*, 109 Wash.App. at 607, 36 P.3d 1103; *State v. Laico*, 97 Wash.App. 759, 763, 987 P.2d 638 (1999); *Strohm*, 75 Wash.App. at 309, 879 P.2d 962.

¶ 18 Here, the jury was properly instructed that it must unanimously agree as to whether either of the two alternative means, mental abnormality or personality disorder, were proved beyond a reasonable doubt.^{FN6} No further instruction as to unanimity was required.

¶ 19 Where a rational trier of fact could have found beyond a reasonable doubt that Pouncy suffered from both a mental abnormality and a personality disorder, Pouncy's constitutional right to jury unanimity was not violated. See *Halgren*, 156 Wash.2d at 811, 132 P.3d 714. Here, Pouncy correctly concedes that substantial evidence was presented to support a jury finding that he suffered from both paraphilia NOS nonconsent and anti-social person-

ality disorder. Thus, there was no error.

III

¶ 20 Pouncy next assigns error to the trial court's decision not to instruct the jury with his proposed definition of "personality disorder."^{FN7}

[5][6] ¶ 21 Whether to give a proposed instruction is within the discretion of the trial court and is reviewed for an abuse of discretion. *In re Det. of Greenwood*, 130 Wash.App. 277, 287, 122 P.3d 747 (2005), rev. denied, 158 Wash.2d 1010, 143 P.3d 830 (2006); *In re Det. of Twining*, 77 Wash.App. 882, 895, 894 P.2d 1331 (1995). Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *Greenwood*, 130 Wash.App. at 287, 122 P.3d 747; *Twining*, 77 Wash.App. at 894, 894 P.2d 1331 (citing *Caruso v. Local 690, Int'l Bhd. of Teamsters*, 107 Wash.2d 524, 529, 730 P.2d 1299 (1987)).

¶ 22 The argument advanced by Pouncy was previously rejected in *Twining*, 77 Wash.App. at 895-96, 894 P.2d 1331. The trial court did not abuse its discretion by following authority of such long-standing duration.

IV

[7] ¶ 23 Pouncy next contends that the trial court improperly commented on the evidence by admitting testimony about the Yakima court's factual findings, critical of Dr. Wollert's methodology, from an unrelated proceeding. Pouncy argues, without supporting authority, that "a judicial comment on the evidence does not cease to be one simply because the comment comes from a judge that is not presiding over the trial." Br. of Appellant at 14. The State, relying on *State v. Gentry*, 125 Wash.2d 570, 888 P.2d 1105 (1995), counters that testimony regarding the Yakima court's factual findings was simply evidence, and that the trial

court ruled on its admissibility without displaying to the jury the trial court's attitude about the merits of the case. Thus, the State contends, the trial court did not comment on the evidence. We agree with the State.

*6 [8][9][10]¶ 24 The Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."CONST. art. IV, § 16. "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wash.2d 825, 838, 889 P.2d 929 (1995). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." *Lane*, 125 Wash.2d at 838, 889 P.2d 929 (emphasis added). "The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury." *Lane*, 125 Wash.2d at 838, 889 P.2d 929 (emphasis added). A court does not comment on the evidence simply by giving its reasons for a ruling. *State v. Dykstra*, 127 Wash.App. 1, 8, 110 P.3d 758 (2005), rev. denied, 156 Wash.2d 1004, 128 P.3d 1239 (2006) (citing *State v. Cerny*, 78 Wash.2d 845, 855-56, 480 P.2d 199 (1971)).

¶ 25 In *Gentry*, the defendant contended that the admission of the defendant's judgment and sentence form from a prior case was an improper comment on the evidence because the judge's signature on the judgment and sentence form demonstrated that the sentencing judge from the prior case was the current trial judge. *Gentry*, 125 Wash.2d at 638, 888 P.2d 1105. Our Supreme Court rejected this argument, noting that "the judgment and sentence of the prior rape was not a comment on the evidence; it was the evidence." *Gentry*, 125 Wash.2d at 639, 888 P.2d 1105. The court stated that "[t]he admission of evidence; standing alone, cannot be considered an unconstitutional comment on the evidence." *Gentry*,

125 Wash.2d at 639, 888 P.2d 1105.

¶ 26 Here, the trial court's admission of the Yakima court's factual findings did not constitute an unconstitutional comment on the evidence. The trial court did not improperly comment on the evidence simply by making an evidentiary ruling on admissibility. Pouncy's claim, therefore, fails.

V

[11]¶ 27 Pouncy is correct, however, in contending that the testimony concerning the Yakima court's findings of fact was improperly admitted. His objection to that testimony should have been sustained.

¶ 28 The cross-examination leading to the State's questions concerning the Yakima court's factual findings was focused on attacking Dr. Wollert's methodology. The State first confirmed that Dr. Wollert used the Null hypothesis in evaluating Pouncy. Next, the State had Dr. Wollert confirm that another expert in the field, Dr. Hanson, opined in a letter that Dr. Wollert's use of the Null hypothesis was unique to him. Then, the State elicited testimony that Dr. Hanson "was not convinced that [Dr. Wollert's] approach is an improvement over existing practice or that it has a robust logical foundation." VRP (Oct. 10, 2006) at 158.

*7 ¶ 29 At this point, the State began its questioning regarding the Yakima court's factual findings by eliciting confirmation from Dr. Wollert that he had "testified in a case of In Re: Robinson," that he had testified about the Null hypothesis in the Robinson case, and that the Robinson matter's factual "findings and conclusions came out in March of 2006." VRP (Oct. 10, 2006) at 159-60. The State then handed Dr. Wollert a proposed exhibit identified as "156." The State then directed Dr. Wollert to "look at finding of fact number 19" in the proposed exhibit while commenting that "it states, 'Dr. Wollert's methods of assessing the impact of age on recidivism are generally not accepted in the'-" VRP

(Oct. 10, 2006) at 160-61. At this point, defense counsel interposed an objection on the basis of foundation.

¶ 30 Viewed in context, it is apparent that the State was seeking to introduce the Robinson findings of fact on the question of whether Dr. Wollert, an expert witness, had acted consistent with the standards of his profession in interviewing and evaluating Pouncy. This is a matter for expert testimony, not lay testimony. See *State v. Willis*, 151 Wash.2d 255, 87 P.3d 1164 (2004). Again, viewed in context, it is apparent that Pouncy's counsel's objection to the questioning, based on a lack of foundation, was premised upon the State's failure to qualify the Yakima judge as an expert witness in the areas of sex offender evaluation and psychology. This objection was properly made.

¶ 31 The admission of expert testimony is governed by ER 702, which provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[12][13] ¶ 32 Before testifying as an expert, the witness is subject to the requirements of ER 702. *State v. Lord*, 161 Wash.2d 276, 294 n. 15, 165 P.3d 1251 (2007). Thus, expert testimony is admissible under ER 702 where (1) the witness qualifies as an expert and (2) the expert's testimony would be helpful to the trier of fact. *State v. Riker*, 123 Wash.2d 351, 364, 869 P.2d 43 (1994). "Judges do not have the expertise required to decide whether a challenged scientific theory is correct." *State v. Wilbur-Bobb*, 134 Wash.App. 627, 632, 141 P.3d 665 (2006). Pouncy's objection should have been sustained.

¶ 33 Later in the trial, the court mentioned that it would have sustained Pouncy's objection had it been made on the basis of relevance. This would have also been a proper basis for objection. Our Su-

preme Court has previously explained the relationship between relevance and ER 702's helpfulness requirement:

Helpfulness and relevancy are intricately intertwined:

"The helpfulness test subsumes a relevancy analysis. In making its determination, the court must proceed on a case-by-case basis. Its conclusions will depend on (1) the court's evaluation of the state of knowledge presently existing about the subject of the proposed testimony and (2) on the court's appraisal of the facts of the case."

*8 *Riker*, 123 Wash.2d at 364, 869 P.2d 43 (quoting *State v. Reynolds*, 235 Neb. 662, 683, 457 N.W.2d 405, 419 (1990)). It is apparent that where opinion testimony is given by a witness who is not qualified to testify to such an opinion, the testimony given is, by definition, not helpful to the finder of fact.

¶ 34 Here, the trial court was correct when it mused in reflection that the Yakima court's factual findings were not relevant. At the same time, Pouncy's objection based on lack of foundation was also correctly interposed. That objection should have been sustained.

¶ 35 On appeal, the State attempts to justify its questioning about the Yakima court's factual findings as simply being appropriate cross-examination of Dr. Wollert. We further address this situation to reinforce that this is not so.

[14][15] ¶ 36 In addition to the two grounds previously discussed, testimony about and evidence of the Yakima court's factual findings were also inadmissible because such testimony or evidence constituted hearsay. Hearsay is an oral or written assertion, "other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless it falls within certain exceptions. ER 802. Hearsay may not be incorporated into questions asked for

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--- P.3d ---, 2008 WL 2134339 (Wash.App. Div. 1)

(Cite as: --- P.3d ---, 2008 WL 2134339 (Wash.App. Div. 1))

impeachment purposes. *Washington Irrigation & Dev. Co. v. Sherman*, 106 Wash.2d 685, 687-88, 724 P.2d 997 (1986).

¶ 37 It is well-established that "[j]udicial findings in other cases proffered as evidence are generally characterized as inadmissible hearsay. See, e.g., *McCormick on Evidence* § 318, at p. 894 (3d ed.1984). No specific exceptions apply under the Federal Rules of Evidence." *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 141 F.Supp.2d 320, 323 (E.D.N.Y.2001). *Accord Nipper v. Snipes*, 7 F.3d 415, 417 (4th Cir.S.C.1993); *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1567 (7th Cir.Ill.1987). Moreover, as noted in the *Blue Cross* case, "[e]xcluding credibility assessing statements by judges in other cases avoids the practical difficulty of weighing judicial opinions against contrary evidence." *Blue Cross*, 141 F.Supp.2d at 323. Indeed, the "difficulty in assessing the probative force of comments by a judge on the credibility of a witness is especially great for a jury, which may give exaggerated weight to a judge's supposed expertise on such matters." *Blue Cross*, 141 F.Supp.2d at 323.

¶ 38 The inappropriateness of seeking the introduction of such testimony has long been recognized:

The obvious purpose was to induce the jury to believe that, as the testimony of the witness as given before them had already been discredited by three judges sitting in the same court in another case, that, therefore, they should discredit it in this case, a wholly unwarranted conclusion unsupported by any authority with which we are familiar.

*9 *Newton v. State*, 147 Md. 71, 127 A. 123, 131 (1924).

¶ 39 As the *Blue Cross* court discussed:

Unlike the scientific community's process of peer review, there is no practical way for a scientist to defend against a judge's assessments of

credibility. Accordingly, courts have also excluded out-of-court statements by judges under *Rule 403* (undue prejudice) and *Rule 605* (prohibiting judges as witnesses).

Blue Cross, 141 F.Supp.2d at 324. As artfully summarized in that case:

The proposed evidence is inadmissible. It is also unfair. When a judge attacks a witness there is no effective defense. Peer review of such witnesses is different; if an expert does not act properly that expert ought to be attacked in the normal course of scientific debate-or in the case of a trial, with the opportunity for rehabilitation and explanation. To appropriately meet the evaluations of another judge would require the jury to delve deeply into the case that judge was trying. This enterprise is not appropriate under *Rule 403*.

....

In this case the cross examination of the witness was blistering and lasted more than a full trial day. An extensive deposition and exchange of reports provided ample fuel for the broad-based attack on the expert's credibility. Defendants' experts will continue the attack. They do not need another judge as an ally.

Blue Cross, 141 F.Supp.2d at 325.^{FN8}

VI

¶ 40 For all of the reasons set forth above, the State's questions about, and utilization of, the Yakima court's findings of fact was improper. The trial court erred by allowing such questioning. Accordingly, a new trial is required.

¶ 41 Reversed.

WE CONCUR: APPELWICK and BECKER, JJ.

FN1. Mental abnormality is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which

predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others."RCW 71.09.020(8).

FN2. Dr. Wollert explained that applying the Null hypothesis to his analysis amounted to approaching his evaluation of Pouncy with the initial assumption that Pouncy was not an SVP and adhering to this belief until the available evidence demonstrated otherwise.

FN3. On redirect examination, Dr. Wollert explained that he evaluated Pouncy before Pouncy was found to be an SVP and that the Null hypothesis is not applied when evaluating a person who has already been determined to be an SVP.

FN4. Dr. Wollert testified that the Bayes theorem is a formula that he used to recalibrate actuarial tests so that they more accurately estimate the sexual recidivism rate for offenders of different ages.

FN5. Pouncy concedes that the diagnoses of paraphilia NOS nonconsent and antisocial personality disorder were supported by substantial evidence, but notes that Dr. Packard testified that he did not conclude that Pouncy "definitely has pedophilia." VRP (Sept. 26, 2006) at 26.

FN6. Relevant portions of Instruction No. 3 reads:

To establish that the respondent, Curtis Pouncy, is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt:

....

That Curtis Pouncy suffers from a mental abnormality and/or a personality disorder which causes serious difficulty in

controlling his sexually violent behavior.

Clerk's Papers (CP) at 991.

FN7. Pouncy proposed defining "personality disorder" as: "A Personality Disorder is an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment."CP at 730.

FN8. In his opening brief, Pouncy assigns error to the admission of this evidence. However, his issue statements focus on two claims: (1) admission of the evidence constituted a comment on the evidence; and (2) his trial counsel provided ineffective assistance by objecting on the basis of foundation rather than relevance. This latter claim necessarily requires that we evaluate the propriety of trial counsel's action. As discussed, we conclude that trial counsel's objection was well-taken.

Under these circumstances, in which the issue was directly addressed to the trial court but only indirectly addressed to us, it is appropriate that we resolve the issue. See *Falk v. Keene Corp.*, 113 Wash.2d 645, 659, 782 P.2d 974 (1989) ("An appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision."); *Alverado v. Wash. Pub. Power Supply Sys.*, 111 Wash.2d 424, 429, 759 P.2d 427 (1988) (same); accord *State v. Aho*, 137 Wash.2d 736, 741, 975 P.2d 512 (1999) ("This court may raise an issue sua sponte and rest its decision on that issue."); *Greengo v. Pub. Employees Mut. Ins. Co.*, 135 Wash.2d 799, 813, 959 P.2d 657 (1998) (same).

--- P.3d ----

--- P.3d ----, 2008 WL 2134339 (Wash.App. Div. 1)

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Wash.App. Div. 1,2008.

In re Detention of Pouncy

--- P.3d ----, 2008 WL 2134339 (Wash.App. Div. 1)

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CLERK OF SUPREME COURT
STATE OF WASHINGTON

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re the Detention of

CURTIS POUNCY

)
)
) No. 59034-1-I
)
)
) Declaration of Service
)

SHARA LOZOTT, being first duly sworn on oath, deposes and states that I arranged for service of a copy of the following documents by ABC Messenger:

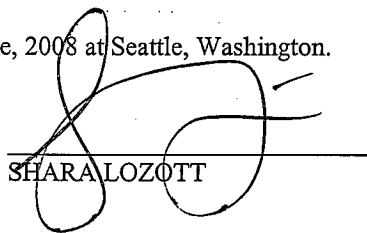
Petition for Review

on:

Casey Grannis
Christopher Gibson
Nielsen, Broman & Koch, PLLC
1908 E. Madison
Seattle, WA 98122

Under penalty of perjury under the laws of the State of Washington, I certify the foregoing is true and correct.

Signed and dated by me this 18th day of June, 2008 at Seattle, Washington.


SHARA LOZOTT

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COURT OF APPEALS
STATE OF WASHINGTON
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